

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JEFFREY S. LITKE</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>FLINT HILLS RURAL ELECTRIC COOP.</b>	)	
Respondent	)	Docket No. 1,059,578
	)	
AND	)	
	)	
<b>FEDERATED RURAL ELECTRIC INS.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the August 27, 2014, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on December 9, 2014. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent.

The ALJ found claimant has a combined 14 percent impairment to the body as a whole for injuries to the right shoulder and neck sustained on September 28, 2009. Moreover, the ALJ determined claimant has a permanent partial general (work) disability of 88 percent. The ALJ noted future medical treatment will be considered upon proper application.

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent argues the findings of the court-appointed independent physician should outweigh any contradicting medical evidence; therefore, respondent maintains claimant's disability is limited to a scheduled injury to the right shoulder as a result of his September 28, 2009, work-related accident. Respondent argues claimant failed to prove he sustained a neck injury as a result of the accident and is not entitled to work disability benefits.

Claimant contends the ALJ's Award should be affirmed in all respects. Claimant noted the ALJ found his testimony credible regarding the onset of neck complaints soon after his work-related accident.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

#### FINDINGS OF FACT

Claimant was employed by respondent as an installer of satellite and internet services. This position required claimant to crawl under houses, dig holes, crawl onto roofs, run wires, and lift frequently. On September 28, 2009, claimant was digging a hole in preparation for erecting a pole for a customer's new internet dish. Claimant testified the ground was very hard, and he had to dig forcefully with a sharp spade. Claimant stated when the hole was approximately two feet deep, he shoved the spade into the hole and immediately felt a pop in his right shoulder and neck. Claimant's right arm from shoulder to fingertips went numb for about 10 minutes before he felt pain. Claimant reported the incident to his supervisor after completing the installation.

Claimant visited his primary care physician, who ordered x-rays and an MRI. The MRI revealed rotator cuff tendinitis, evidence of impingement, and some mild degenerative changes. Claimant's primary care physician referred him to orthopedic surgeon Dr. Bryce Palmgren. Dr. Palmgren treated claimant's right shoulder conservatively with physical therapy and injections for several months. Claimant testified he informed both his primary care physician and Dr. Palmgren of his neck pain and resulting headaches beginning immediately after the accident. Claimant testified it was his understanding these conditions stemmed from the nerves in his damaged shoulder and would disappear once his shoulder healed.

On July 28, 2010, Dr. Palmgren performed a right shoulder arthroscopy with open rotator cuff repair, biceps tenodesis and subacromial depression. Claimant continued to experience right shoulder and neck pain with headaches following surgery. Claimant indicated his condition worsened after surgery and he began having an electric shock sensation in his right arm. Claimant described:

Anywhere from about three to fifteen times a day, my arm will just jut straight out. My hand will fly open just for no reason. It can be when I'm trying to do something. It can be when I'm just relaxing. It's just like somebody just shocks me.<sup>1</sup>

Claimant followed up with Dr. Palmgren, undergoing physical therapy, home exercises, and steroid injections. He also continued to work for respondent in an

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<sup>1</sup> P.H. Trans. (May 22, 2012) at 13.

accommodated position until his termination on March 28, 2011. Dr. Palmgren recommended another MRI, which was performed May 4, 2011. The MRI revealed a suggestion of a small labral tear and moderate joint effusion. Dr. Palmgren discussed the possibility of another surgery.

At that point, the nurse case manager recommended claimant get a second opinion. Claimant was examined by Dr. Bradley Daily, an orthopedic surgeon, on May 18, 2011. Claimant was advised by respondent's counsel that Dr. Daily's report indicated claimant had no neck symptoms. Claimant disputed the report:

Q. At that time, it reports history of no neck symptoms. Is that what you told Dr. Daily?

A. I would very much disagree with that because I can distinctly remember him having me walk and view me sitting in a chair and his reference was, well, I think those problems are from your posture. He said your shoulder hurts, your shoulder is injured. You carry yourself – he said I think your neck and headache problems are from your posture and the way you carry yourself. That's what his exact comments were and I don't know why he would have put in there that I had no symptoms. I can distinctly remember that.<sup>2</sup>

Claimant testified the nurse case manager, who was present at the examination by Dr. Daily and nearly every appointment with Dr. Palmgren, controlled all conversations with the doctors. Claimant indicated the nurse case manager would interject, ask questions, and formulate opinions regarding claimant's neck pain and other conditions, relating everything to claimant's shoulder injury. When asked for an example by the ALJ, claimant stated:

She would – she would ask about the pain in my neck or something that I was referring to and then she would say, well, don't you think that's just nerve trouble and that will be all over with or don't you think that's just related to the shoulder injury, and when we referred to somethin', she would say, well, don't you think that's just attributed to the shoulder or the surgery or somethin' like that.<sup>3</sup>

Claimant stated he was unaware the nurse case manager's presence was not required at his appointments.

On July 7, 2011, Dr. Palmgren performed a right shoulder arthroscopy and open revision of the rotator cuff repair. Claimant testified he continued to have the same problems with his neck and headaches following the second surgery. Claimant treated

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<sup>2</sup> *Id.* at 25-26.

<sup>3</sup> *Id.* at 34.

with Dr. Palmgren through December 16, 2011. Claimant testified he was scheduled to return to Dr. Palmgren after December 2011 for additional treatment, but was unable to return because authorization was denied.

Dr. John Estivo, a board certified orthopedic surgeon, evaluated claimant at respondent's request on January 12, 2012. Claimant reported experiencing "very minimal right shoulder pain," rated at two to three out of ten on the pain scale.<sup>4</sup> Claimant denied any numbness to the right arm, any previous cervical spine injuries and any complaints to the left arm. Claimant told Dr. Estivo he continued to have intermittent spasms to the right elbow and right hand. Dr. Estivo concluded claimant was "status post right shoulder rotator cuff repair followed by revision of rotator cuff repair" with "subjective complaints of spasms and paresthesias to the right arm."<sup>5</sup>

Dr. Estivo opined:

It is difficult to explain the symptoms he claims to be experiencing with his right arm at this point. Neurologically his right arm appears to be intact. I cannot explain from a medical standpoint why he would be having sudden spasms causing him to involuntarily extend his right elbow and involuntarily open his hand. A nerve conduction test/EMG could be done to further evaluate this, but I have a lot of difficulty attributing those symptoms to his injury claim of 09/30/2009. The patient could undergo an MRI to his cervical spine to further evaluate his subjective complaints of paresthesias in the right arm, but he did not injure his cervical spine in relation to the claim of 09/30/2009 and I would have difficulty relating the need for a cervical spine MRI to the injury claim of 09/30/2009.<sup>6</sup>

Dr. Estivo determined claimant was at maximum medical improvement (MMI) and required no further medical treatment in relation to the right shoulder. Dr. Estivo recommended a permanent restriction of limited over-the-shoulder work with the right upper extremity and continued home exercises. Using the *AMA Guides*,<sup>7</sup> Dr. Estivo opined claimant sustained a five percent impairment to the right upper extremity based on active range of motion.

Dr. Pedro Murati, a physician board certified in physical medicine and rehabilitation, electrodiagnosis and independent medical evaluations (IME), examined claimant three times, each at claimant's counsel's request. On March 13, 2012, claimant complained of

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<sup>4</sup> Estivo Depo., Ex. 2 at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

pain in the neck causing headaches and pain in the upper back and right shoulder. Dr. Murati reviewed claimant's medical records, history, and performed a physical examination. Dr. Murati noted a history of two surgeries on the right shoulder, in addition to "neck and shoulder pain with signs and symptoms with radiculopathy and myofascial pain with the right shoulder girdle affecting the upper back and neck."<sup>8</sup>

Dr. Murati opined claimant's diagnoses were, within all reasonable medical probability, a direct result of the September 28, 2009, work-related accident. Dr. Murati imposed temporary restrictions and recommended an MRI of claimant's cervical spine and a bilateral upper extremity NCS/EMG including the cervical paraspinals. He also recommended conservative treatment with physical therapy, cortisone injections, and medication.

Dr. Paul Stein, a neurological surgeon, examined claimant for purposes of a court-ordered IME on August 7, 2012. Claimant complained of pain moving from the right trapezius into the right side of the neck to the head, difficulty raising and intermittent jerking of the right upper extremity, and numbness/tingling from the right shoulder to the elbow at rest. Dr. Stein reviewed claimant's history, medical records, and performed a physical examination. Dr. Stein noted claimant sustained a right shoulder injury at work on September 28, 2009, and underwent two surgeries followed by physical therapy. Dr. Stein determined claimant was at MMI and did not recommend further treatment for the shoulder injury. Further, Dr. Stein wrote:

There is no definitive indication on physical examination to document a cervical radiculopathy and the reports of these symptoms do not appear in the treatment records until some time after the work incident. Nonetheless, for completeness of evaluation, we will proceed with a cervical MRI scan and EMG/and NCT of the right upper extremity.<sup>9</sup>

Dr. Stein issued a follow-up report to the ALJ dated August 20, 2012, following the administration of an EMG/NCT and an MRI of the cervical spine. Dr. Stein noted claimant's EMG/NCT showed some mild carpal tunnel findings but was negative for evidence of radiculopathy. The MRI, which Dr. Stein reviewed and discussed with the radiologist, revealed some age-related degenerative changes, but no disk herniation and no spinal or nerve root impingement. Dr. Stein again had no recommendation for additional treatment.

Claimant returned to Dr. Murati on December 6, 2012, and underwent an NCS/EMG. Dr. Murati reexamined claimant on December 18, 2012. In his report, Dr. Murati related a diagnosis of bilateral carpal tunnel syndrome, right ulnar cubital syndrome,

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<sup>8</sup> Murati Depo. at 7-8.

<sup>9</sup> Stein IME (Aug. 7, 2012) at 5.

and neuropraxic right C6-7 radiculopathy. He also noted trigger points in the right shoulder girdle extending into the cervical and thoracic paraspinals.<sup>10</sup> Dr. Murati explained during his deposition that “neuropraxic C6-7” means the nerve is still alive but is being compressed at the level of the neck.<sup>11</sup> Dr. Murati recommended an MRI of the cervical spine and conservative treatment, including a series of cervical epidural steroid injections. Dr. Murati noted a surgical evaluation could be possible if claimant failed to improve with conservative treatment.

Claimant underwent a series of cervical injections with Dr. Florin Nicolae beginning May 1, 2013, through August 2013. Claimant’s last visit with Dr. Nicolae was on September 6, 2013, when he underwent radiofrequency ablation. Claimant stated the procedures improved his right arm spasms and his neck and headache condition for a short period, though the symptoms eventually returned. Claimant testified he would not repeat the radiofrequency ablation due to adverse side-effects.

On November 12, 2013, claimant returned to Dr. Murati a final time for rating purposes. After reviewing claimant’s updated history, additional medical records, and performing a physical examination, Dr. Murati concluded his previous impressions remained unchanged. Dr. Murati used the *AMA Guides* in formulating his rating opinion. He testified:

In regards to the impairment the neck was easy, that’s a 15 percent impairment based on a DRE III category. The upper back is five percent based on a sprain from the myofascial pain syndrome. For the severe crepitus on the shoulder, that’s Table 18 and 19, that’s a 18 percent. I assigned ten percent for the two surgeries using Table 27. Those combine to 26 percent upper extremity, which converts to 16 percent whole person. The left carpal tunnel syndrome would be a ten percent upper extremity which converts to six. All of those whole person impairments combine to 36 whole person impairment.<sup>12</sup>

Dr. Murati imposed restrictions of frequently lifting, carrying, pushing, or pulling up to 5 pounds, occasionally up to 10 pounds, and never over 20 pounds, based on claimant’s right shoulder, neck, and upper back.

Doug Lindahl, a vocational rehabilitation counselor, interviewed claimant on December 17, 2013, in person, at claimant’s counsel’s request. Claimant is a high school graduate with no additional training or education. Mr. Lindahl generated a task list of 33 unduplicated tasks claimant performed in the 15 years prior to his work-related accident.

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<sup>10</sup> See Murati Depo., Ex. 4 at 4.

<sup>11</sup> Murati Depo. at 9.

<sup>12</sup> *Id.* at 12.

Dr. Murati reviewed the task list generated by Mr. Lindahl. Of the 33 unduplicated tasks on the list, Dr. Murati opined claimant could no longer perform 25, for a 76 percent task loss. Dr. Murati's task loss opinion is uncontroverted.

Claimant was unemployed at the time of his interview with Mr. Lindahl. Claimant has not worked since March 28, 2011. Claimant received unemployment benefits beginning on or about March 1, 2012, through May 2012. Claimant testified he has not searched for employment since July 2012. He stated he was not aware of his exact restrictions other than no overhead lifting and no climbing, and he could not recall which doctor imposed his restrictions. Claimant said, "That's one of the reasons that I've never looked for a job. I didn't know what my restrictions . . . I had no idea, sir."<sup>13</sup>

Claimant owns a ranch with approximately 400 acres of land, with cattle he raises for slaughter. Claimant indicated he performed all work on his ranch prior to September 28, 2009, but after the accident his sons do the work. Claimant testified he is no longer able to drive a tractor and had to purchase a specially-equipped truck to distribute hay and feed to his cattle. Claimant also owns rental properties, where he performs light maintenance within his known restrictions. Claimant indicated that while his rental properties generated about \$8,000 in income in 2013, the ranch lost about \$8,000. Claimant stated the ranch has lost money in prior years, and he does not pay himself an income from ranch proceeds.

Claimant described his current symptoms:

Severe headaches. Severe neck aches. My shoulder is to some extent better, but I can't raise my shoulder. I can't do any lifting with my arm out away from my body. I can't get my [arm] up over my head.<sup>14</sup>

Claimant noted the pain interrupts his sleep, and because he refuses to take narcotics, he treats with over-the-counter medication for the pain.

#### **PRINCIPLES OF LAW**

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions upon which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.<sup>15</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by

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<sup>13</sup> R.H. Trans. at 27.

<sup>14</sup> *Id.* at 13.

<sup>15</sup> K.S.A. 2009 Supp. 44-501(a).

a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>16</sup> To persuade by the preponderance of the evidence requires the claimant to demonstrate the greater weight of evidence in view of all the facts and circumstances.<sup>17</sup>

K.S.A. 2009 Supp. 44-510e(a) states, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

### **ANALYSIS**

The primary issue is whether claimant's neck complaints relate to the September 28, 2009, injury by accident. Claimant's testimony is that he had neck complaints from the beginning. Claimant testified he told Dr. Palmgren about the neck pain and was told the pain was related to the shoulder. The ALJ found claimant's testimony regarding the onset of neck pain credible, stating:

The Court finds Claimant credible that he had neck complaints soon after the work accident. However, there was no reference to neck complaints until October 27, 2010. However, Claimant had a nurse case manager at his doctor's appointments with Dr. Palmgren and Dr. Estivo that always attempted to steer Claimant's complaints about his neck to the right shoulder and that any neck complaints would

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<sup>16</sup> K.S.A. 2009 Supp. 44-508(g).

<sup>17</sup> See *In re Estate of Robinson*, 236 Kan. 431, 620 P.2d 1383 (1984).



be taken care of with the right shoulder surgery. It is also well settled that “a claimant’s testimony alone is sufficient evidence of his own physical condition.” *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92,95 (2000). . . .

However, there were two EMGs in this case that had different results. One EMG found no cervical radiculopathy and the other found cervical radiculopathy. That is not sufficient evidence to establish radiculopathy.<sup>18</sup>

The Board agrees with the ALJ’s conclusion that claimant’s neck condition is related to the injury. In addition to claimant’s testimony that he had neck complaints from the beginning, Dr. Stein notes in his report claimant’s initial complaints to Dr. Palmgren included the right side of the neck. The Board also agrees claimant failed to prove cervical radiculopathy.

The Board disagrees with the ALJ’s conclusion regarding the basis of claimant’s neck impairment. The ALJ bases her award of a five percent impairment on myofascial pain syndrome. Dr. Murati assessed impairment for myofascial pain syndrome affecting the thoracic paraspinals under Thoracolumbar DRE Category II of the *AMA Guides*.<sup>19</sup> Dr. Murati did not diagnose or rate myofascial pain syndrome for the cervical spine. Dr. Murati did assess a five percent impairment to the cervical spine for trigger points in the cervical paraspinal muscles. Dr. Murati testified, had he not found an impairment related to cervical radiculopathy, he would have assessed a five percent impairment for the trigger points, referring to trigger points extending into the cervical paraspinal muscles. Dr. Murati’s testimony relating to an impairment to the cervical spine based on trigger points is uncontradicted.

In its brief, respondent argues Dr. Stein found no evidence of cervical injury based upon testing he recommended after he examined claimant. Dr. Stein’s August 20, 2012, report, to which respondent was referring, contains no opinion relating to whether claimant suffered an injury to the cervical spine. In the supplemental report, Dr. Stein noted age-related degenerative changes of the cervical spine with no evidence of radiculopathy. Dr. Stein indicated he had no recommendations for treatment for the cervical spine.

The evidence of permanent impairment is provided by Drs. Murati and Estivo. Dr. Murati assessed a 5 percent whole body rating to the cervical spine for trigger points extending into the cervical paraspinal muscles and a 26 percent impairment to the right shoulder. Dr. Estivo assessed an impairment rating of 5 percent of the upper extremity for the right shoulder. Both physicians are well-known advocates for their respective referral sources. The Board, as did the ALJ, finds their opinions relating to the cervical spine and

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<sup>18</sup> ALJ Order (Aug. 27, 2014) at 10-11.

<sup>19</sup> See Murati Depo., Ex. 4 at 5.

right shoulder to be equally credible. The Board adopts the ALJ's finding of a 14 percent impairment to the body as a whole.

**CONCLUSION**

Claimant suffered an injury and whole body impairment to the cervical spine arising out of and in the course of his employment with respondent.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 27, 2014, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
jeff@jkcooperlaw.com  
toni@jkcooperlaw.com

Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier  
jbrewer@jbrewerlegal.com  
jlyons@jbrewerlegal.com

Rebecca A. Sanders, Administrative Law Judge